Supreme Court, U.S.
FILED

02 1718 MAR 10 2003

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OLIVER "BUCK" REVELL,

Petitioner,

v.

DAVID HOFFMAN, ESTATE OF ALEXANDER B. MAGNUS AND AMERICANS FOR RESPONSIBLE MEDIA, a corporation.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issue is whether the Tenth Circuit erred and violated this Court's standards and is in conflict with five other circuits in interpreting **The New York Times v. Sullivan** decision by setting a new standard requiring petitioner in a public figure defamation case to prove "actual malice," and "recklessness," by creating a virtually impossible objective burden of proving by "concrete evidence" the subjective state of mind of **HOW** respondents "in fact entertained serious doubt as to the truth of the allegation on which a reasonable juror could return a verdict in his favor." This practically ends the ability of virtually all public officials to obtain any remedy for false and malicious "per se" defamatory statements. A sampling of allegations includes:

* "Mass murder.. I mean PanAm 103."
* "They knew about the bombing and didn't stop it." Instead: "Several minutes before flight 103 took off from London's Heathrow airport, FBI Assistant Director Oliver "Buck Revell rushed out to the tarmac and pulled his son and daughter in law off the plane." [Revell was actually in the U.S. that day].
* "He was approached by security consultants to Vice President Bush who were working for Mr. Revell and Lt. Col. Oliver North. They wanted me to create a 'death squad' that would have White House deniability to assassinate people they would identify as terrorists." [Wheaton denies that he ever spoke to the author about it.]
* "Oliver "Buck" Revell was transferred to the Dallas FBI office to keep a lid on the case" to cover up alleged CIA involvement " in E-Systems drug smuggling."
* "Interestingly, Revell was the FBI's lead investigator in the crash of an Arrow Air D.C.-8 which exploded on Dec. 12, 1985 in Gander, Newfoundland, with the loss of all 248 personnel. As in [the] Oklahoma City [Murrah Bombing], the

site was quickly bulldozed, destroying crucial forensic evidence." [Evidence was handled by Canadian authorities in Canada.]

* "Hoffman/Revell/E-Systems. Here is a story of political/intelligence agency deception, intrigue and murder!"

"There were five other whistleblowers..Michelle Cooper had gone to Danny James - Revell's subordinate... Cooper subsequently had her son killed, then she was killed."

* Mr. Revell is "an FBI agent guilty of a whole litany of crimes."

Respondent Hoffman subsequently admitted in depositions that most of his "statements of fact" were based on hearsay, his alleged "feelings" and "ideas" about mere "possibilities," based on information from alleged "confidential sources" which he refused to identify, and his deliberate refusal to check facts by contacting Mr. Revell.

Whether the court below erred that respondents had not unlawfully defamed the Petitioner, Oliver "Buck" Revell, retired Associate Deputy Director of the FBI under the Bush and Clinton Administrations, by making manifestly false statements about him, when the court below misrepresented and/or ignored (1) concrete evidence of falsity; (2) evidence that Respondent Hoffman purposefully avoided avenues of investigation that might have demonstrated that the statements were false, and deliberately refused to contact Petitioner who would have dispelled the falsity of the defamatory allegations; (3) affidavit and pleadings by the purported source of the allegation that he never discussed with the author the creation of "death squads" to murder opponents of the government, much less linking it to the Petitioner; (4) evidence that Respondent's sole source of income for over three years was the mercenary smearing of public officials in the furtherance of anti-government and anti-law enforcement agenda of Respondents Magnus and his extremist organization AMR. (5) Requiring this evidence to be submitted at the summary judgment stage.

IN THE SUPREME COURT OF THE UNITED STATES

Revell v. Hoffman et al,

No.

CERTIFICATE OF INTEREST

Stan Twardy, Counsel for Oliver "Buck" Revell certifies that:

1. The full name of every party or amicus represented by me, is only Mr. Oliver "Buck" Revell.

2. The name of the real party of interest represented by me is only Mr. Oliver "Buck" Revell.

3. There are no parent companies, subsidiaries or amicus represented by me.

4. I am the only attorney who has represented Mr. Revell in all the proceedings below.

Stan Twardy

STAN TWARDY
Counsel for Appellant

TABLE OF CITED AUTHORITIES

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OPINIONS BELOW

This action was filed in the United States District Court for the Western District of Oklahoma. That Court entered Summary Judgment for Respondent. Petitioner appealed in a timely fashion to the United States Court of Appeals for the Tenth Circuit, Case No. 01-6169. That Court affirmed in a published opinion on October 30, 2002. (App. 1.)

On November 12, 2002, Petitioner filed a Petition for Rehearing with a Suggestion of a Rehearing En Banc. On November 19, 2002, Petitioner filed a Motion to Supplement Petition for Rehearing and Rehearing En Banc by enclosing a decision of the Ninth Circuit, published on November 13, 2002, one day after Petitioner filed for Rehearing. This decision deals with the same subject matter, but sets conflicting standards for the determination of "actual malice" in defamation of public officials.

On December 10, 2002, the Court of Appeals for the Tenth Circuit granted Petitioner's Motion to Supplement the Petition for Rehearing (App. 2,) but in a separate decision, denied a rehearing. (App. 3.) This petition for writ of certiorari is filed timely ninety (90) days from that date. 28 USC, Section 2101(c.)

JURISDICTION

This Court has jurisdiction under 28 USC, §1254 (1) to review the Circuit Court decision on a writ of certiorari.

STATEMENT OF THE CASE

This case presents issues of fundamental importance concerning the scope of protection afforded public officials in defamation cases as it pertains to the interpretation of ***New York Times v. Sullivan***, 376 U.S. 254 (1964), and the criteria to delineate the scope and proof of "actual malice" and "recklessness,"and to resolve the conflict between the Tenth

Circuit and this Court and five other circuits.

The gravamen of this complaint is publication of a book "The Oklahoma City Bombing and the Politics of Terror," submission to publishers and circulation on the Internet of excepts from the as yet unpublished book "Murdergate," and other materials, written by Respondent David Hoffman, which include the fabrication of numerous allegations of crimes allegedly committed by Petitioner.

Petitioner, Oliver "Buck" Revell is a retired Associate Deputy Director of the FBI, who served under Presidents Bush and Clinton with responsibility for all FBI criminal and counterintelligence investigations. In their published materials Respondents falsely alleged and the courts below ignored the concrete falsity of the evidence and Respondent Hoffman's recklessness in alleging: ● That a certain Mr. Wheaton claimed that "he was approached by security consultants to Vice President Bush who were working for Mr. Revell and Lt. Col. Oliver North. They wanted me to create a 'death squad' that would have White House deniability to assassinate people they would identify as terrorists." (Rec. 71.) **In his affidavit and pleadings, Mr. Wheaton denied that he ever discussed the matter with the author.** (Text Infra.) ●That Mr. Revell failed to prevent the bombing of PanAm flight 103, but instead:●"Rushed to the tarmac of London's Heathrow airport to pull his son and daughter in law off the Pan Am flight 103 minutes before the flight," ●That Mr. Revell thereby knowingly and wilfully failed to act to prevent the bombing with a loss of some 270 lives; (Rec.110, 111,) **In his affidavit, Mr. Revell testified that he, his son Chris and daughter in law were in the U.S. at the time.** (Rec. 99-101.) ● That "Oliver "Buck" Revell was transferred to the Dallas FBI office to keep a lid on the case" to cover up alleged CIA involvement "in E-Systems drug smuggling," (Rec.140.) **Also denied in Mr. Revell's affidavit.** ●That Mr. Revell destroyed evidence in the bombing

of a DC-8 in Gander with the loss of 248 personnel. **The evidence was in Canada and was handled by Canadian authorities. The FBI merely assisted in identifying the victims.** ●That "a whistle-blower, after reporting to Mr. Revell's subordinate had her son killed, then she was killed." (Rec. 140.) ●That Mr. Revell is "an FBI agent guilty of a whole litany of crimes." (Rec. 141.)

Thus, the court below erred in not considering **"concrete evidence"** of Hoffman's state of mind, attested by his disingenuous deposition answers: "I was also told that he (Mr. Revell) was ***possibly*** the person in the FBI who shut down the Finders case, which is a U.S. Customs-CIA pedophile case. Kidnaping, child kidnaping, mind control, prostitution rings."(Rec. 135, 243.) ● ***Mr. Wheaton, the purported source linking Mr. Revell to"death squads" which supposedly "used assassination and torture to eliminate enemies of the state," denied in his affidavit and pleadings that he ever spoke to Mr. Hoffman about it.*** (Rec.232, Affidavit, Infra.) ● Q: "What involvement personally do you think Mr. Revell had with drug smuggling?" A. ***"confidential source,"*** and ***"various witnesses"*** (Rec. 135, 136.) ● When asked about his sources that Mr. Revell committed **"mass murder"**) A: "Mr. Revell had been written about extensively... ***"I can give you an idea, a feeling. He is mentioned in the context*** .." ● "How did he know? ***Perhaps*** Revell's intimate knowledge derived from his relationship with Oliver North." (Rec. 68.) ● ***"I admit that I erred in the book by stating that he physically pulled his son off the plane."*** ● ***"I had heard the allegation before, or I had read the allegation before, but I can't recall at this late date exactly where."*** (Rec. 297.) ● Q: Who called Mr. Revell "A damage control man for Oliver North in the Iran-Contra situation," A.: ***"A lot of people***. I am writing a chapter about all the ***murders***... ***Mr. Revell is mentioned in that context,***" (Rec. 134.) ● And,***"I am not going to give you my confidential sources."*** (Rec.136.") ● Mr. Hoffman's recklessness in

deliberately not checking with Mr. Revell. Q. "How come you haven't asked him before you wrote this book? A. "***It has been my experience in dealing with government officials, if they are involved in criminal allegations, mostly all they do is deny things."*** (Hoffman depo. P. 29, Pet. Brief P.23.)

How much more reckless can a respondent be than alleging without a shred of evidence that a Deputy Director of the FBI would have knowingly and deliberately for no reason failed to prevent the heinous crime of mass murder of 270 people? In alleging that Mr. Revell removed his son and daughter-in-law from the doomed aircraft, Mr. Hoffman unequivocally alleges that Mr. Revell knew about and believed the bombing threat and that by his inaction he became an accessory to the mass murder; that he used his high position in the FBI only to fly to London to save his son and daughter in law, but did absolutely nothing to prevent the bombing when one phone call would have sufficed. Since Hoffman does not appear to be completely irrational, one must ask if he had a reasonable doubt that such an inherently improbable scenario was for real? The record clearly establishes that **this whole story is pure fiction**; that the FBI had not received any warning of the impending PanAm 103 bombing, and that at all times pertinent hereto, Mr. Revell never left Washington and was at FBI headquarters, and all his family members were in the United States. (Rec. 99-101.)

In the book, "The Oklahoma City Bombing and the Politics of Terror, Mr. Revell is also accused of involvement in the creation of "death squads" under the guise of fighting terrorism while he served as Executive Associate Director of the FBI, the second highest career position in the Bureau, and while serving on the then Vice President Bush's Task Force on Combating Terrorism. This activity was supposedly carried out by individuals purportedly working for Mr. Revell and Lt. Col. Oliver North on this task force. Did Hoffman really believe it? His named source denies that he ever spoke to Hoffman about it.

Although none of the respondents ever alleged that Mr. Revell had personally solicited a certain Mr. Wheaton to form the death squads, and Mr. Wheaton has expressly denied it in his affidavit and pleadings, **nevertheless, the Tenth Circuit not only ignored the evidence, but injected from thin air an allegation that the purported personal approach was made by Mr. Revell by adding *"including Revell,"* into its opinion in Note 1 as a purported fact.** Even though counsel for the Petitioner brought this matter to the attention of the Court. (Pet. for Rehearing P 3-4,) the record was not corrected and the calumny was thereby even further aggravated and given wider credence. The Wheaton affidavit states :

> "In order to clarify any potential misunderstanding of this paragraph, Mr. Revell never asked him (me) to form 'death squads' to murder opponents of the U.S. government under the guise of fighting terrorism. I was not "approached" by Mr. Revell; I have no knowledge that Mr. Revell was aware of the recruitment of me and/or authorized any approach to me. The 'They' in the paragraph does not refer to Mr. Revell, but instead refers to individuals who represented to me that they were consultants of the Task Force. Indeed, I have never met Mr. Revell. ***Finally, I never spoke to the author concerning the contents of this paragraph.***"

The publication of the defamatory materials, amounting to an expenditure of some $100,000,00 over a period of three years, constituted the largest single expenditure and activity of Respondent "Americans for Responsible Media," (ARM,) an organization dedicated to irresponsibly smearing ranking government officials. This whole scheme was falsely smearing government and law enforcement officials was instigated, aided and abetted by Respondent Alexander B. Magnus, now

deceased, and willingly, knowingly and recklessly carried out by Respondent Hoffman as his mercenary "hired gun." It was his sole source of income for over three years and his uppermost concern was to please Magnus. His writings were virtually totally financed by Mr. Magnus' personal funds and his Magnus Charitable Trust, a tax exempt organization, through Respondent Americans for Responsible Media, another tax-exempt organization, wholly under the control of Mr. Magnus. Respondent Hoffman was the only person specifically employed to propagate these smears.

Mr. Revell's most distinguished career of 30 years in the FBI was readily acknowledged by the District Court in its decision, but the Court granted a summary judgment on the premise that Mr. Revell had been a public official at the time and that he failed to prove "actual malice" and "recklessness" in the publication of the cited allegations as the Court interpreted the decision in ***New York Times v. Sullivan.***

The Tenth Circuit holding that Mr. Revell could not prove "actual malice" and "that the defendant ***in fact*** (emphasis ours) entertained serious doubts as to the truth of his publication" is contradicted by entire record and surrounding circumstances. Thus, the court below improvidently sustained a summary judgment which violates the standards requiring the defamation plaintiff to show **"actual malice,"** and **"recklessness,"** as defined by this Court in considering a defendant's state of mind when defaming a public figure. These standards were established in ***New York Times v. Sullivan***, 376 U.S. 254 (1964,) and its progeny. They require only consideration of circumstantial evidence and the record in full ***(Harte-Hanks Communications v. Daniel Connaughton,*** 491 U.S. 657;) improbability of the allegations ***(St. Amant v. Thompson*** 390 U.S. at 731), falsity of allegations ***(Gertz v. Robert Welch, Inc.,*** 418 U.S. 223; ***Milkovich v. Lorraine Journal Co,,497 U.S.*** 1) examination of surrounding

circumstances ***Curtis Publishing Co. v. Butts**, 388 U. S. 155,)* and/or whether "The defendant in fact entertained serious doubts) as to the truth of the publication,"(***St. Amant***.) The extremely rigid interpretation of ***New York Times v. Sullivan*** by the Tenth Circuit, not only contradicts the broader the holdings of this Court, but also contradicts holdings of five other circuits, where the courts required only "a high degree of awareness of probable falsity." Or, "while suspecting falsity, deliberately avoided taking steps that would have confirmed the suspicion." Or, "failure to make an adequate investigation." ***(Clyburn v. News World Communications, Inc.***, 903 F.2d 29. D.C. Cir. 1990.) Or, where the courts spoke of "wilful blindness," or "intellectual gigolos." (Citations infra.)

REASONS FOR GRANTING THE WRIT

The decision of this Court is needed to prevent irreparable damage to public officials not by curtailing criticism, but by holding responsible willful defamers who propagate falsehoods to damage or destroy reputations of public officials under the guise of the First Amendment.

The petition should be granted for two reasons. First, the Tenth Circuit judgment, as a practical matter, sets the standard for the interpretation of "actual malice" and "recklessness" under ***New York Times vs. Sullivan*** in a manner never contemplated by this Court and which is in conflict with five other circuits in interpreting the ***New York Times*** standards. By requiring Petitioner to prove a subjective state of mind by "concrete evidence" of actual malice without relying on circumstantial evidence, especially at the summary judgment stage, the court below makes it virtually impossible to prove the existence of such malice, short of a confession, use of truth drugs, or some psychological or psychiatric examination, or, mind reading, which could objectively determine (if that were possible,) the defamer's subjective state of mind that he "in fact"entertained doubts about the veracity of the allegation, and

did not act with reckless disregard for the truth."

Thus, the main issues are what kind of "concrete evidence" a defamation plaintiff must offer of the defendants' "subjective state of mind" to permit the case to proceed to trial, and where can he find it if not by using circumstantial evidence as determined by this Court.

In sustaining the summary judgment, the court below totally disregarded the teaching of ***Liberty Lobby***, 477 U.S. at 248, in which this Court held that: "We must consider whether a reasonable jury could return a verdict for the non moving party." Petitioner respectfully submits that no reasonable jury would believe, when presented with significant evidence of the falsity of the allegations, that Mr. Hoffman was not reckless when he alleged that the Associate Deputy Director of the FBI knowingly and wilfully did nothing to stop the bombing of an American plane, which resulted in the murder of 270 people, but instead only rushed to London's Heathrow airport to remove his son and daughter-in-law from the doomed plane. Nor would a reasonable jury believe, without any proof to support such an allegation, that Mr. Hoffman was not reckless when he alleged Mr. Revell while serving on the Vice-President's task force to combat terrorism, was in any way involved in the formation of "death squads" to kill American citizens, especially when the allegation is denied by its purported source; or, that as Special Agent in Charge of the FBI in Dallas, Mr. Revell covered up CIA drug smuggling, or, that somehow Mr. Revell destroyed evidence held by Canadian authorities in Canada.

"Interestingly, Revell was the FBI's lead investigator in the crash of an Arrow Air D.C.-8 which exploded on Dec. 12, 1985 in Gander, Newfoundland, with the loss of all 248 personnel. As in Oklahoma City, the site was quickly bulldozed, destroying crucial forensic evidence." (Rec. 70.) Causing the destruction of evidence is also a crime (18 U.S.C., § 1512 (b)(2)(B.) The truth is that the Gander investigation was conducted by Canadian authorities and the FBI had only a

liaison role and helped identify the victims. Another piece of fiction recklessly disseminated by Respondent Hoffman! Hoffman's credibility and state of mind are also brought into question by his deposition testimony that he was also "investigating" some 70-100 murders committed by former Presidents Bush and Clinton. (Sic! Rec. 133.)

Deliberate lies or calculated falsehoods are not protected by the First Amendment. (Const. Amend. 1.)

In ***Milkovich vs. Lorraine Journal Co., 497 U.S. 1***, this Court held that: "For a statement to be actionable under the First Amendment, it must at a minimum express or imply a verifiably false fact about appellant." As indicated above, the allegations against Mr. Revell were not merely distortion of facts, but for the most part pure fiction, and repetition of totally false and fabricated allegations.

Second, the court below also erred when contrary to the evidence, it held that reliance on published materials, somehow negates recklessness and creates immunity from defamation. The court below bolstered this argument by suggesting in footnote No. 1 that defendant Hoffman,'s reliance on certain sources somehow shields his defamatory statements. This contradicts the law enunciated by this Court and several circuits. Moreover, the court below was advised, as set forth herein below, that the purported inquiries either never occurred, or were so unreliable as not to merit any credence.

This is exactly the kind of reckless dissemination of lies and falsehoods that this Court wanted to avoid when it held in ***Gertz v. Robert Welch, Inc.,*** 418 U.S. 223 that: "False statements of fact harm both the subject of the falsehood and the readers of the statement... There is no constitutional value and false statements of fact." Any other interpretation perverts both the meaning and intent of the First Amendment, and creates an open season for the defamation of public officials.

Even the Tenth Circuit had previously held: "One who

repeats or otherwise re-publishes defamatory matter is subject to liability as if he had originally published it." ***Schwartz v. American College of Emergency Physicians***, Tenth Circuit, No. 98- 2228, wherein the court also adopted the *Restatement of Torts 2d Sec. 578.* The law is settled that unless the re-publication is privileged, a person is liable for the publication of defamatory words concerning another, even though he is only repeating what he has heard and names his authority, (***Utah State Farm Bureau Federation v. National Farmers Union Service Corporation, (CA 10 Utah) 198 F.2d 20 and Theiss v. Scherer, (CA6 Ohio) 396 F.2d 646,)*** and even though the repetition is made without any design to extend the circulation of the defamation or because the person to whom it is addressed believed it to be true. ***Layne v. Tribune Co., 108 Fla. 177, 146 So. 234.*** "The principle is the person who repeats slander heard from another endorses it." Id. In addressing this issue this Court held in ***Harte- Hanks***: "In a case such as this involving the reporting of third party's allegations, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his report." Similarly, the ***Clyburn v. News World Communications, Inc. 903 F.2d 29.*** *D.C. Cir. 1990)* court merely addressed "different levels of hearsay," and castigated a reporter who recklessly used uncorroborated hearsay information in a case where the publication was found liable. Respondent Hoffman cannot claim any privilege to justify the publication and re-publication of his false allegations against Mr. Revell.

Hoffman's state of mind and veracity must be judged by his sources and use of the defamatory materials against Mr. Revell. A purported conversation with former defendant Gene Wheaton which never happened according to the Wheaton affidavit, supra. Another source of the defamatory materials, is an article from the Portland Free Press, entitled "Stephen Emerson, Prime Time Press Pimp." This article states among others, "The book, Trail of the Octopus, provides a trail of

media pimps which include Christopher Byron at the New Yorker magazine, Stephen Emerson at CNN, Mike Wallace at CBS 60 Minutes, and their superspooks, Buck Revell (FBI) and Vincent Cannistrano (CIA.) These five guys are damage control for the U.S. government crimes that deserve to be noted for special attention. Anything they are pumping for public consumption must be back checked to determine whether a pumphose is in the cesspool of U.S. government crimes." (Emphasis ours. (Rec. 160.) Mr. Hoffman readily admitted that the sources for much of his information were the Portland Free Press and the Marxist Review. These fringe publications are the supposedly reliable sources on which Respondent Hoffman relied for his information!

Thus, the decision of the District and Appeals Courts centers on the issue whether Petitioner had to, could and did prove by "clear and convincing evidence" at the summary judgment stage that the defamatory falsehoods were made with the knowledge of their falsity or with reckless disregard of the truth. In its decision, the Court of Appeals seriously erred when it held: "Revell proffers no evidence indicating that Hoffmann entertained doubts regarding the truth of the statements in *Oklahoma City Bombing*." Thus, the court below expressly contradicted this Court's holdings about the use of circumstantial evidence, the totality of the record and inherent improbability in examining the state of mind of the defamer by holding that:

> **" Throughout his brief, Revell characterizes the existence of malice as facially 'apparent' and 'obvious' based on the 'inherent improbability' of Hoffman's statements. Revell argues that 'malice here is evidenced by both specific statements and the totality of the book.'"**

Similarly, in its decision, the District Court pointed out that:

> "As evidence of actual malice plaintiff asserts

> the defamatory statements speak for themselves; plaintiff has attested to the falsity of the statements by affidavit; and they were published with total disregard for the truth. Plaintiff also states as evidence of malice that defendant Hoffmann had expressed great animosity towards law enforcement and prior writings which show his tendency to indulge in conspiracy theories; Hoffmann wrote the book for financial gain; and it defies common sense to believe that plaintiff would commit the acts alleged during his service in the FBI. In addition, plaintiff asserts that the defamatory allegations written by Hoffmann constitute an extreme departure from professional journalistic standards."

Thus, the court below erred and contradicted the holdings of this Court and other circuits in holding that circumstantial evidence is insufficient, and by demanding objective "concrete evidence" of the respondent's subjective state of mind that he "in fact" entertained serious doubts as to the truth of his publication. This is a novel standard placing on the Petitioner a virtually impossible burden of proof through the narrowest possible interpretation of the decision in the *New York Times v. Sullivan.* The Tenth Circuit also disregarded and contradicted the more qualified holdings of subsequent Supreme Court and appellate decisions regarding defamation of public figures and public officials where the courts require only "a high degree of awareness of probable falsity" and the "requirement to consider the factual record in full." Or, "while suspecting falsity, deliberately avoided taking steps that would have confirmed the suspicion." Or, where the courts spoke of "wilful blindness," or "intellectual gigolos."

(Citations infra.) Hoffman's writings meet all the above criteria. Petitioner cannot overemphasize that in **Harte-Hanks** this Court held that **liability attaches even when defendants believed the allegations to be true**:

> "When those findings are considered alongside the undisputed evidence, the conclusion that the newspaper acted with actual malice inexorably follows....Actual malice requires at a minimum that the statements were made with a reckless disregard for the truth." (Ibid.) The court further elaborated that: "In determining whether the constitutional standard of actual malice has been satisfied, the reviewing court must consider the factual record in full..... The reviewing court must examine for itself the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect. U.S.C.A. Constitution, Amendment 1... "When considered cumulatively, they must provide a clear and convincing evidence of actual malice."

"Actual malice requires a knowing and reckless disregard of the truth. ***Clyburn v. News World Communications, Inc.*** *903 F.2d 29. D.C. Cir. 1990.* Setting the rule for determination of "malice," within the scope of ***New York Times v. Sullivan,*** *supra*, the Court held:

> "Malice may be inferred in a situation where the party charged with libel has no reasonable basis for believing that the allegedly liable statement was true. Such situation would exist, for instance, if there was failure to make an adequate investigation." The court further held that "The negligence must rise to the level of

recklessness in order for there to be "malice."

The court below did nothing of the sort. Respondent Hoffman's allegations of criminality against Mr. Revell and his deliberate refusal to check the facts, or even contact Mr. Revell, exemplify such recklessness and failure to make an adequate investigation.

Although Mr. Revell was a public figure, he is still entitled to certain protections of the law as set forth hereinabove in the holdings of this Court and other circuits. Throughout these proceedings, respondents presented nothing to refute the falsity and recklessness of their allegations as attested by the affidavits of Mr. Revell. (Rec. 99-100,) the pleadings and affidavit of Mr. Wheaton, and the depositions of respondents Hoffman and Magnus.

Notwithstanding the above, the Tenth Circuit held that: "Because Revell fails to offer any evidence concerning defendants ***subjective state of mind*** (emphasis ours), we have before us no ***concrete evidence*** (emphasis ours,), which a reasonable juror could return a verdict in his favor."

Thus, the issues become how and where does one find ***concrete evidence*** of a ***subjective state of mind***, except from circumstantial evidence, especially at the summary judgment stage. Respondent Hoffman subsequently admitted in deposition that most of these statements of fact were based on his alleged "feelings" and "ideas" about mere "possibilities," and hearsay on hearsay based on information from alleged "confidential sources" which he refused to identify. (Rec. 136,) and which in fact, may not even exist.

"***In Curtis Publishing Co. v. Butts***, *388 U.S. 155,* this Court accorded "Public figures as well as public officials recovery of damages for the publication of a 'defamatory falsehood' whose substance makes a substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinary adhered to by responsible

publishers."

In ***Harte-Hanks Communications v. Daniel Connaughton***, 491 U.S. 657, elaborating on this decision, this Court pointed out that: "A review of the entire record of the instant case discloses substantial evidence from which a jury could have concluded that the Journal was singularly biased in favor of the incumbent and prejudiced against Connaughton.." How much more so in the case of Mr. Hoffman, who testified in his deposition: Q. "Does the FBI go around assassinating people?" A."You'd better believe it." (Sic! Page 38.) This is exactly the situation here where the Respondents' published materials show extreme bias against law enforcement and a number of individuals who held high positions in the U.S. government, including specifically the Petitioner, Mr. Revell, former President George Bush, and others.

St. Amant v. Thompson, 390 U.S. at 731, requires that: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication." In spelling out how courts should examine allegations of malice, this Court held that: "When considered cumulatively, they must provide a clear and convincing evidence of actual malice." In the case herein, "actual malice" is evidenced by the cumulative publication of numerous false and defamatory statements in the book and on the Internet with reckless disregard for the truth.

Citing ***St. Amant***, this Court in ***Harte-Hanks*** further explained that: "As it is often true for inquiries into the state of mind, proof may take the form of circumstantial evidence, such as the existence of "obvious reasons to doubt the veracity of the informant or the accuracy of his reports or the inherent improbability of the reports." In addition, The ***St. Amant*** Court found "the following factors to be relevant in a showing that a defendant harbored actual malice: (1) whether a story is fabricated or is based wholly on the unverified anonymous source, (2) whether the defendant's actions are so inherently

improbable that only a reckless person would have put them in circulation, or (3) whether there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." All these elements are clearly evidenced by acts of the respondents.

The falsity of the fabricated allegation that Mr. Revell rushed to the tarmac of London's Heathrow airport to remove his family members from the doomed plane is uncontroverted. The inherent improbability of the Vice President of the United States and the Associate Deputy Director of the FBI conspiring to engage in criminal activity involving mass murders and drug smuggling is obvious. Since this Court has repeatedly asserted that the question whether evidence of defamation is sufficient to support the existence of actual malice is the examination of the full record and surrounding circumstances, Petitioner respectfully submits that the court below disregarded both numerous specific statements and the totality of the book and materials published by Hoffman on the Internet, which present "obvious reasons to doubt the veracity of the information or the accuracy of his reports." This Court repeatedly addressed issue of "recklessness" and showed how such recklessness can be determined from the conduct of the defamer - namely, through circumstantial evidence.

Yet, the court below contradicted these opinions by stating that "Revell argues that malice here is evidenced by both specific statements and the totality of the book," thus contradicting all the ***St. Amant*** tests. Supra. There are obvious reasons here to doubt Hoffman's veracity and the accuracy of his reports. As indicated above, Mr. Hoffman's sole source of income were payments from defendant Magnus for promoting his anti-government agenda and smearing government officials, past and present. Sources relied upon by Respondent Hoffman included documented outright lies, hearsay, hearsay on hearsay, fringe publications and anonymous and unidentified individuals. By his own admission, Mr. Hoffman made no efforts to contact Mr. Revell, who was readily accessible, but instead relied upon

The Marxist Review, The Portland Free Press and other fringe publications. How much of this stuff he actually believed is anybody's guess. What matters is what he published.

Further, the court below erroneously stated that Respondent Hoffman conducted an investigation prior to publishing "and we have no facts before us that might call into question the veracity of Hoffman's sources." In Note 1, the court states that Hoffman relied on a Public Broadcasting System sponsored book and a documentary accusing Mr. Revell of efforts to obstruct justice in collaboration with former Marine Lt. Col. Oliver North. While such a book was published in Britain, the PBS documentary was never aired after the falsity of the allegations was made known to PBS. (Rec. 257.) This was also made known to the Court in Petitioner's Reply Brief (P.4.) (2) The undersigned counsel advised the Court during oral argument that the essay by Hart Lidov critical of Mr. Revell was posted on the Columbia website nearly two years after the publication of the book "The Oklahoma City Bombing and the Politics of Terror." (Rec. 183.) (3) The Court below was advised in both pleadings and orally that Mr. Wheaton expressly denied in pleadings in an affidavit any contact with Mr. Revell, or that Mr. Revell had any knowledge of the formation of the supposed "death squads, or that he ever claimed that Mr. Revell authorized the approach to Mr. Wheaton, ***and that he had never discussed the matter with Mr. Hoffman.*** (4) The undersigned attorney also advised the court in oral argument that Mr. Hudson told him that he had no recollection of where or how the story originated about Mr. Revell rushing to the tarmac of Heathrow Airport to remove his son from the doomed PanAm 103 flight, but remembered vaguely hearing about it. Mr. Revell's son was initially booked on that flight, but when his military leave from Germany was advanced by several weeks, he immediately returned to the United States.

The decision of the Tenth Circuit of virtually rejecting circumstantial evidence as a means of proving "actual malice"

conflicts with holdings of both this Court and other circuits in many important ways. The interpretation of "actual malice" and "reckless disregard" has been addressed both by this Court and several circuits which have given broad interpretation to the manner how actual malice can be proven. The rigid and unrealistic interpretation of the word "In fact" and the construction of **"concrete evidence,"** by the Tenth Circuit puts a virtually impossible burden on the Petitioner to objectively explore the mind of the defamer for a subjective opinion. It is nebulous and ambiguous standard, if not contradictory in terms, and does not serve the interests of justice. It is alien to the holdings of this Court and other circuits, and deprives decent and dedicated public officials of their constitutional rights. This Court should not allow circuits to make such grievous errors and cause other courts to be less than thorough in reviewing defamatory statements that have not been allowed to reach the jury. If allowed to stand, this decision of The Tenth Circuit will establish an unlimited precedent for the most reckless defamation of public officials and leave aggrieved parties with no recourse.

It is undisputed that in ***The New York Times*** and its progeny, this Court wanted to protect free-speech under the First Amendment and allowed great leeway in the protection of the media. Petitioner respectfully submits that the protection was primarily for the expression of critical opinions of government officials, rather than a constitutional fig leaf for fabrication and dissemination of outright falsehoods and lies. Such an interpretation does not serve the protection of free speech or of freedom of the press. It merely provides a cover for irresponsible promulgation of falsehoods.

In addition, it should be pointed out that the decision of the Tenth Circuit sustaining the summary judgment was made despite the existence of genuine material issues in dispute, and the court did not view them in the light most favorable to the non-movant as required by Fed. R. Civ. P. 56(c).

CONFLICTS

Certiorari is warranted because the decision below is in fundamental conflict with the decisions of this Court in interpreting "actual malice" and 'recklessness" in the defamation of public officials, and conflicts with the decisions of no fewer than five other circuits, including its own prior holdings.

The Tenth Circuit seriously erred in holding that deliberate lies and/or calculated falsehoods expressed about the Petitioner by Respondent Hoffman are protected by the First Amendment because Mr. Revell at the time served as a public official. This is contrary to numerous decisions of this Court, the D.C. Circuit, the 2nd Circuit, the 5th Circuit, the 7th Circuit, the 9th Circuit, and even the holding of the10th Circuit in another case. This makes it difficult to discern the logical boundary of the Tenth Circuit reasoning in contradicting the seminal decisions of this Court and the aforementioned appellate courts in setting the standards for determining "actual malice" and "recklessness." If allowed to stand, the Tenth Circuit decision would roll back virtually all the protection afforded public officials against false, reckless and malicious defamation. This makes it imperative that this Court address the gross departure from its own standards, and resolve the conflict of circuits.

- The court below contradicted the holding in ***Gertz*** which is unambiguous. "False statements of fact harm both the subject of the falsehood and the readers of the statement... There is no constitutional value in false statements of fact." Similarly in ***Milkovich***, 497 U.S. at 19-20, this Court decided that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law."

- Respondents made a number of specific false and defamatory statements. Petitioner showed significant circumstantial evidence of actual malice and recklessness in the publication of these defamatory materials. In granting summary judgment, the district court precluded Petitioner from presenting

to a jury further evidence of the falsity of the claims made by the Respondents, thus contravening this Court in ***Liberty Lobby*** and the 9th Circuit in ***Gennifer Flowers***.

- **The court below erred and contradicted the holdings of this Court and other circuits by ignoring controverted evidentiary facts in deciding that "there is insufficient evidence to show that Hoffman's writings constitute defamation," by ignoring multiple allegations of criminality as not being evidence of defamation, and by not applying the standard of review for summary judgments by holding that the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, must show that there is no genuine issue as to any material fact and that only then the moving party is entitled to a judgment as a matter of law. *(Fed. R. Civ.P. 56(c,)* and that the evidence must be interpreted in a light most favorable to the nonmovant. To hold otherwise is an egregious error.**

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate when the Court determines that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23 (1986); ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 250 (1986).

To survive a motion for summary judgment, the nonmovant "must establish that there is a genuine issue of material fact" and "must do more than simply show that there is some metaphysical doubt as to the material facts." ***Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.***, 475 U.S. 574, 585-86 (1986).

In ***Committee for the First Amendment v. Campbell***, 962 F.2d 1517, 1521 (Tenth Cir. 1992), held:"Summary judgment is appropriate if "there is no genuine issue as to any material fact" and: "We view the evidence in a light most favorable to the

nonmovant; however, it is not enough that the non-movant's evidence be 'merely colorable' or anything short of 'significantly probative.'" ... In holding otherwise, the court below again contradicted this Court and other circuits.

- **The court below erred and contradicted the holdings of this Court and other circuits by ruling that the allegations of criminality made against the Petitioner by the Respondents were not defamatory "per se."** The record in this case reeks with allegations of criminality against Mr. Revell. Supra.

This Court in ***Pollard vs. Lyon***, 91 U.S.225, made it unequivocally clear that imputation of a crime constitutes defamation per se. In numerous other decisions, this Court and several appellate courts also emphasized that any printed or written statement which falsely charges another with a commission of the crime is considered actionable per se. ***Riss v. Anderson*** *(CA8 Mo) 304 F2d 188;* ***Marteney v. United Press*** *(CA10 Ks.);* ***Meyerson vs. Hurlbut****,98 F. 2d cert denied 305 U.S. 610, and numerous other cases.*

Similarly, The Oklahoma Supreme Court held that: "Examining the language of the article contextually, the language of the article is libelous per se only if it engenders in the mind of a reader a conclusion, impression, or opinion of the plaintiff that is defamatory, and as such tends to expose plaintiff to public hatred, contempt , or obloquy..... While the court makes the libel per se determination as a matter of law, the material must be considered by its natural and probable effect upon the mind of the average lay reader. "***Sellers v. Oklahoma Pub. Co.****, 687 P.2d 116 (Okl. 1984.)* "Publication is actionable per se when the language is susceptible of only opprobrious meaning and shows on the face of it that the statement as a whole refers to plaintiff." ***Holway v. World Pub. Co.****, 44 P.2d 881, 171 Okl. 306*.

- In considering actual malice and respondent

Hoffman's ***state of mind*** in writing and quoting these defamatory materials, the court below ignored decisions of this Court, other circuits and the Oklahoma Supreme Court, cited hereinabove, which if applied to this case, would make it clear that Hoffman acted recklessly by making outrageous allegations of criminality against public figures to collect money from individuals and institutions which had an anti-government and anti-law enforcement agenda, such as Respondents Magnus and Americans for Responsible Media. In his deposition, Hoffman readily admitted that he did not even bother to check with Mr. Revell whether there was any truth to the allegations before he published his book. (Appendix 60-67.)

In Gennifer Flowers v. James Carville et al., No. 00-17299, the 9th Circuit stated: "We have held that "when a speaker outlines the factual basis for his conclusion, his statement is protected." ***Partington v. Bugliosi***, 56 F.3d 1147, 1156 (9th Cir. 1995). This assumes, however, that the factual basis itself is true. See ***Standing Comm. v. Yagman***, 55 F.3d 1430, 1440 (9th Cir.1995) (" '[W]here a publication sets forth the facts underlying its statement of opinion.., and those facts are true, the Constitution protects that opinion from liability for defamation.' "(quoting ***Lewis v. Time, Inc.***, 710 F.2d 549, 556 (9th Cir.1983)) (emphasis added)). **A speaker can't immunize a statement that implies false facts simply by couching it as an opinion based on those facts.** (Emphasis ours.) See ***Milkovich v. Lorain Journal Co.***,497 U.S. 1, 19 (1990). **Likewise, a defamatory statement isn't rendered non-defamatory merely because it relies on another defamatory statement.**" (Emphasis ours.) The 9th Circuit further held:

"We ask only whether the pleadings are sufficient, not whether the plaintiff could find evidence to support them. See, e.g., ***In re Glenfed, Inc.*** Sec. Litig., 42 F.3d 1541, 1547 (9th Cir. 1994) (en banc) ("[P]laintiffs may aver [state of mind] generally, just as [Rule 9(b)] states--that is, simply by saying

that [it] existed."). The First Amendment imposes substantive requirements on the state of mind a public figure must prove in order to recover for defamation, but it doesn't require him to prove that state of mind in the complaint. As the **Fifth Circuit** explained:

> "The Court in New York Times required "convincing clarity" of the proof presented to show actual malice[;] however, this requirement extends only to the proof required to meet the constitutional demands. As to the complaint, the Federal Rules of Civil Procedure require only that "[m]alice, intent, knowledge, and other condition of mind of a person.., be averred generally." Rule 9(b). ***Belli v. Orlando Daily Newspapers, Inc***., 389 F.2d 579, 589 (5th Cir. 1967) (citation omitted); see also ***Boyd v. Nationwide Mut. Ins. Co***., 208 F.3d 406, 410 (2d Cir. 2000)."

The Ninth Circuit concluded:

> "The Flowers complaint lists the precise statements alleged to be false and defamatory, who made them and when. That she averred the required state of mind generally, without alleging corroborating evidence, does not defeat her complaint. Flowers has done more than simply allege that she was 'libeled with malice.' Her complaint is sufficient."

Similarly, Petitioner's complaint, which meets all the above requirements should be deemed sufficient and the standards of the Tenth Circuit should not conflict with the 9th Circuit on such an important issue.

Also, in ***Desnick vs. American Broadcasting Companies, (CA7, No. 99-3715)*** the Court held: "In a defamation case by a public figure, therefore, "the plaintiff must demonstrate that the author 'in fact entertained serious doubts as

to the truth of his publication,' . . . or acted with a 'high degree of awareness of probable falsity,'" ***Masson v. New Yorker Magazine***, *supra, 501 U.S. at 510 (quoting* ***St. Amant v. Thompson****, 390 U.S. 727, 731 (1968), and* ***Garrison v. Louisiana****, 379 U.S. 64, 74 (1964)*, respectively), or, while suspecting falsity, deliberately avoided taking steps that would have confirmed the suspicion. ***Harte-Hanks Communications, Inc. v. Connaughton****, 491 U.S. .657, 692-93* (1989) ("intent to avoid the truth," id. at 693); ***Eastwood v. National Enquirer, Inc.****, 123 F.3d 1249, 1251 (9th Cir. 1997); **McFarlane v. Sheridan Square Press, Inc.**, 91 F.3d 1501, 1510 (D.C. Cir. 1996).* (For the analogy to this "ostrich" or "willful blindness" principle in cases under 42 U.S.C. sec. 1983, see ***West v. Waymire****, 114 F.3d 646, 651 (7th Cir. 1997)*.) In other words, "The defendant must either know that his published statement was probably false or, suspecting that it may be false, deliberately close his eyes to the possibility."

- **The court below further erred and contradicted the holdings of this Court and other circuits when it contradicted this Court's *St. Amant* standard inquiring "whether the defendant's actions are so inherently improbable that only a reckless person would have put them in circulation." Nor did the court below apply another test set by this Court in the *St. Amant* case of whether "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."** See ***St. Amant*** and Argument supra.

- **The court below further erred and contradicted the holdings of this Court and other circuits in not relying on the well-established law that a re-publication of false and defamatory allegations with little regard for the reliability of the sources, constitutes a re-publication for purposes of defamation. In so doing, the court below expressly nullified and contradicted the decisions of this Court, the D.C.,**

Second and Ninth circuits.

In addressing this issue, the Ninth Circuit held in ***Flowers*** :

> "A defamatory the statement isn't rendered non-defamatory merely because it relies on another defamatory statement... Unfortunately, the district court overlooked the venerable principle that a person who repeats a defamatory statement is generally as liable as the one who first utters it: On the quaint homespun logic that "[t]alebearers are as bad as talemakers," each repetition of a defamatory statement by a new person constitutes a new publication, rendering the repeater liable for that new publication .... The law deems the repeater to "adopt as his own" the defamatory statement. Liability for repetition of a libel may not be avoided by the mere expedient of adding the truthful caveat that one heard the statement from somebody else."

(Note 1: R. Smolla, **Law of Defamation** #4:87, at 4-136.3 to -136.4 (2d ed. 2001) (footnotes omitted). "Every repetition of the defamation is a publication in itself, even though the repeater states the source, or resorts to the customary newspaper evasion 'it is alleged' . . . **"Prosser and Keeton on the Law of Torts** #113, at 799 (5th ed. 1984) (footnotes omitted); see e.g., ***Liberty Lobby, Inc. v. Dow Jones & Co.***, 838 F.2d 1287; 1298-99 (D.C. Cir. 1988). Were this not the rule, there would be no need for the common law privilege for fair reports of official proceedings, see ***Sahara Gaming Corp. v. Culinary Workers Union Local 226***, 984 P.2d 164, 166-68 (Nev. 1999), or the constitutional privilege of "neutral reportage" that some courts have recognized, see ***Edwards v. Nat 'l Audubon Soc 'y, Inc.***, 556 F.2d 113, 120 (2d Cir. 1977);

Barry v. Time, Inc., 584 F. Supp. 1110, 1124-28 (N.D. Cal. 1984).

The Flowers court concluded that: "In this case, the truth of the news reports on which defendants claim to have relied is disputed." This is equally true of this situation herein.

● **Finally, contrary to the decision of this Court in *St. Amant*, the court below erred in rejecting or ignoring the *St. Amant* tests when it held that plaintiff had not met his burden of proof for defamation of a public figure, notwithstanding the showing that there was (1) publication of the defamatory statements; (2) that the defamatory statements were false, and (3) that the defamatory falsehoods were made with malice and knowledge that it was false, or with reckless disregard of whether it was false or not. Thus, the decision of the Tenth Circuit cannot be reconciled with the law as enunciated by this Court and other circuits.**

In his affidavit, (Rec.99-100,) Mr. Revell has categorically denied ever receiving the warning that Pan Am flight 103 would be bombed. He attested that he was at FBI headquarters, not in London at the time, and that his son and daughter-in-law were in the United States; and that the FBI investigation which he directed into the bombing was conducted in a thorough and professional manner. Among witnesses listed by the Petitioner who would have testified to the above and to Mr. Revell's probity and outstanding character and accomplishments were the Hon. David Boren, at the time the United States senator who headed the intelligence committee which had oversight over the investigation; former Oklahoma Governor Frank Keating, who at the time held high position in the Justice Department and worked closely with Mr. Revell in the investigation; Mr. Robert Ricks, currently Oklahoma Commissioner of Public Safety, who at the time assisted Mr. Revell in the investigation, and Mr. Richard Marquise, formerly Chief of the Anti-Terrorism Section of the FBI, who at the time

also assisted Mr. Revell in the investigation. Other ranking law enforcement officials were also listed as potential witnesses that PanAm 103 was a no holds barred investigation, and that under Mr. Revell's direction the FBI engaged in a relentless pursuit of terrorists and foiled many attempted acts of terror.

Finally, Mr. Hoffman's mendaciousness is attested by the affidavit of his supposed source, Mr. Wheaton, who declared under oath that he never discussed the question of any "murder squads" with Mr. Hoffman.

Most importantly, public interest requires that this Court protect public officials from reckless dissemination of lies and falsehoods under the guise of the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

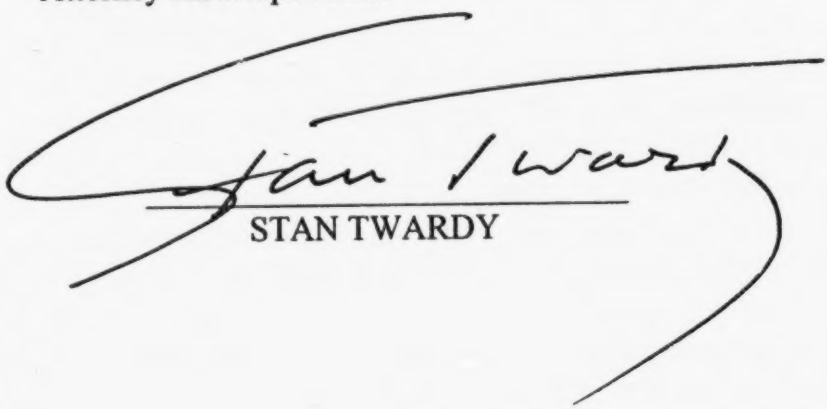
Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on April 29, 2003, three true and correct copies of the above and foregoing, were mailed, proper postage prepaid, to:

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228 Robert S. Kerr Blvd., Suite 720
Oklahoma City, OK 73102
Tel. 405-235-4074
Attorney for Respondents



STAN TWARDY

Appendix 1

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 01-6169

OLIVER "BUCK" REVELL,
Plaintiff-Appellant,

V.
DAVID HOFFMAN, an individual;
ALEXANDER B. MAGNUS, an individual;
AMERICANS FOR RESPONSIBLE
MEDIA, a foreign corporation,

Defendants - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

(D. Ct. No. CIV-99-637-C)

Stan Twardy, Oklahoma City, Oklahoma, appearing for the Appellant.

J. Michael Johnston, Oklahoma City, Oklahoma, appearing for the Appellees.

Before TACHA, Chief Judge, ALDISERT(*), and

McWILLIAMS, Circuit Judges.

TACHA, Chief Circuit Judge.

I. Background

Oliver "Buck" Revell brought suit in federal district court against the defendants, David Hoffman, Alexander B. Magnus, and Americans for Responsible Media ("ARM"), seeking damages for defamation and civil conspiracy under Oklahoma law. Revell also included two other individuals, Gene Wheaton and Paul Hudson, and a foreign corporation, Feral House. Wheaton and Feral House were dismissed, and Hudson declared bankruptcy. On September 5, 2002, this court received the appellee's suggestion of death of Alexander B. Magnus. Thus, only David Hoffman and ARM remain as defendants on appeal.

Plaintiff-Appellant, Oliver "Buck" Revell served in the Federal Bureau of Investigation ("FBI") for thirty years, rising to the position of Associate Deputy Director. Revell also served on the Vice-President's Task Force on Terrorism, the National Foreign Intelligence Board, and the Terrorist Crisis Management and Deputies Committee of the National Security Council. In addition, he served as Vice-Chair of the Interagency Group for Counterintelligence and the President's Commission on Civil Aviation Security and Terrorism. Revell has testified before committees in both the House and Senate and has previously appeared on various national news programs, including *60 Minutes, Face the Nation,* and *Nightline.*

David Hoffman is the author of two books, *The Oklahoma City Bombing and the Politics of Terror* (hereinafter *"Oklahoma City Bombing")* and the unfinished book *Murdergate.* Alexander B. Magnus, through the not-for-profit organization Americans for Responsible Media (hereinafter "ARM"), funded Hoffman's work on both books. *Oklahoma City Bombing* and *Murdergate*

both contain statements concerning Revell's activities during his tenure at the FBI. The following passages are from *Oklahoma City Bombing:*

1. In 1985, Wheaton was approached by security consultants to Vice President Bush's "Task Force on Combating Terrorism" who were working for USMC Lt. Colonel Oliver North and Associate Deputy FBI Director Oliver "Buck" Revell. "They wanted me to help create a 'death squad' that would have White House deniability to assassinate people they would identify as terrorists," said Wheaton... .Wheaton claims the program continues to the present day. (p. 63).

2. On December 5, 1998, a Palestinian named Samra Mahayoun warned authorities in Helsinki that a Pan Am 747 leav.ng Frankfurt was to bombed [sic] within two weeks. (p. 170).

What is interesting is that Oliver "Buck" Revell, former Counter-Terrorism chief of the FBI, pulled his son and daughter-in-law off Pan Am 103 minutes before the flight. Did Revell know something the rest of us did not? (p. 170, n. **).

3. Several minutes before flight 103 took off from London's Heathrow airport, FBI Assistant Director Oliver "Buck" Revell rushed out to the tarmac and pulled his son and daughter-in-law off the plane. (p. 313).

4. "A number of VIPs were pulled off that plane. A number of intelligence operatives were pulled off that plane." South African president Peter Botha and several high- ranking officials were advised by state security forces to change their reservations at the last hour. The South African State Security forces have a close relationship with the CIA.

As in Oklahoma City, this would become the catch-all phrase

that would set everything right and prove the government had no involvement. Of course, this would be somewhat difficult in Revell's case, since he pulled his son and daughter-in-law off the plane minutes before it took off .... Interestingly, Revell was the FBI's lead investigator in the crash of an Arrow Air DC-8 which exploded on December 12, 1985 in Gander, Newfoundland, with the loss of all 248 personnel. (p. 317).

5. It was also an act that the U.S. shadow government, responsible for precipitating, was anxious to cover up. Had the true cause of the crash -- [Oliver] North's double-dealing with the Iranians -- been revealed, the Iran-Contra scandal would have surfaced two years before it had Buck" Revell would be on hand to make sure it didn't. (p. 318).

6. Oliver North and "Buck" Revell helped develop the policy of militarizing our law-enforcement. One example is the FBI, which is now being given sniper training in the military. That training helped the Bureau massacre 86 people at Waco, the first time in recent history that the government violated the Posse Comitatus Act by using federal troops on American citizens. (p. 382).

According to Revell, *Murdergate* contains similar allegations.

Defendants moved for summary judgment, arguing that Revell is a "public figure" and the First Amendment therefore limits Revell's right to recover for defamation under Oklahoma state law. *See New York Times v. Sullivan,* 376 U.S. 254 (1964). The district court agreed and granted defendants' summary judgment motion. The district court held that Revell failed to offer sufficient evidence from which a reasonable jury could conclude that defendants acted with "actual malice," as required under *New York Times,* 376 U.S. at 279-80. For the reasons set forth below, we AFFIRM.

II. Discussion

A. Standard of Review

We review the district court's grant of summary judgment *de novo. Comm. for the First Amendment v. Campbell,* 962 F.2d 1517, 1521 (10th Cir. 1992). "In reviewing a grant or denial of summary judgment, we apply the same standard applied by the district court under Federal Rule of Civil Procedure 56(c)." King v. *Union Oil Co. of Cal.,* 117 F.3d 443,444-45 (10th Cir. 1997). Summary judgment is appropriate only if "there is no genuine issue as to any material fact and.., the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In conducting our review, "[w]e view the evidence in the light most favorable to the nonmovant." *Campbell,* 962 F.2d at 1521 (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)). At the same time, "it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.'" *Id.* (citing *Liberty Lobby,* 477 U.S. at 248).

In considering whether a fact is material, we must look to the applicable substantive law. *Liberty Lobby,* 477 U.S. at 248. To determine whether a dispute is genuine, we must consider whether a "reasonable jury could return a verdict for the nonmoving party." *Id.* In addition, we must incorporate into our summary-judgment determination any heightened evidentiary standard required under the applicable substantive law. *Pub. Serv. Co. of Colo. v. Cont'l Cas. Co.,* 26 F.3d 1508, 1517 n.8 (10th Cir. 1994) ("Summary judgment 'necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.'") (quoting *Liberty Lobby,* 477 U.S. at 252). Applying this standard, we conclude that Revell is unable to establish a genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

B. Liability for Defamation

Revell seeks to recover damages for defamation under Oklahoma law. The First Amendment, however, "prohibits a *public official* from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with *'actual malice.'" New York Times,* 376 U.S. at 279-80 (emphasis added). Accordingly, we must first consider whether Revell is a "public official" for First Amendment purposes.

1. Status as Public Official

In *Rosenblatt v. Baer,* 383 U.S. 75 (1966), the Supreme Court articulated the test for determining whether a person is a public official under the First Amendment. The Court held that the "'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.* at 85.

The district court found that Revell had a "[thirty-year] career in the government, in particular the high echelons of the FBI where he had an influential role in fundamental issues of this country's national and foreign policy." Dist. Ct. Order at 9. We have no doubt that Revell's various governmental positions are of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Rosenblatt,* 383 U.S. at 86. Further, we have previously held that law-enforcement personnel are "public officials" for First Amendment purposes. *See Gray v. Udevitz,* 656 F.2d 588, 591 (10th Cir. 1981) (citations omitted).

Revell argues, however, that he is no longer a public official, as he has now retired from the FBI. We disagree. In *Udevitz,* we noted:

That the person defamed no longer holds the same position does not by itself strip him of his status as a public official for constitutional purposes. If the defamatory remarks relate to his conduct while he was a public official and the manner in which he performed his responsibilities is still a matter of public interest, he remains a public official within the meaning of *New York Times.*

Id. at 591 n.3 (citing *Rosenblatt,* 383 U.S. at 87 n.14).

Under *Udevitz* and *Rosenblatt,* we hold that Revell is a public official for First Amendment purposes. *See Rosenblatt,* 383 U.S. at 85; *Udevitz,* 656 F.2d at 591. In order to recover damages for defamation, Revell must therefore prove that defendants acted with actual malice. *See New York Times,* 376 U.S. at 279-80. Further, Revell must prove actual malice by clear and convincing evidence. *See Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 511 (1991). Accordingly, we proceed to consider the actual malice inquiry under *New York Times* and its progeny.

2. Actual Malice

Actual malice exists where a party publishes a defamatory statement "[1] with [actual] knowledge that it was false or [2] with reckless disregard of whether it was false or not." *Id.* at 280. Although reckless disregard "cannot be fully encompassed in one infallible definition," *St. Amant v. Thompson,* 390 U.S. 727, 730 (1968), the Supreme Court has made clear that "[t]he mere failure to investigate cannot establish reckless disregard for the truth." *Gertz v. Welch,* 418 U.S. 323, 332 (1974). Rather, there must be "sufficient evidence to permit the conclusion that

the defendant *in fact* entertained serious doubts as to the truth of his publication." *St. Amant,* 390 U.S. at 731 (emphasis added). This inquiry is "a *subjective* one -- there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of... probable falsity.'" *Harte-Hank Communications, Inc. v. Connaughton,* 491 U.S. 657, 688 (1989) (emphasis added). Reckless disregard "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant,* 390 U.S. at 731.

Revell proffers no evidence indicating that Hoffman entertained doubts regarding the truth of the statements in *Oklahoma City Bombing.* Throughout his brief, Revell characterizes the existence of malice as facially "apparent" and "obvious" based on the "inherent improbability" of Hoffman's statements. Revell argues that "malice here is evidenced by both the specific statements and the totality of the book." Revell confuses what might be considered *some* evidence of actual malice with what, standing alone, will suffice to carry his burden of proving actual malice. Even if we were to accept that Hoffman's statements were "inherently improbable," this would merely lessen -- rather than meet -- Revell's burden of offering some extrinsic evidence of Hoffman's actual malice. *St. Amant* makes quite clear that *New York Times* requires "either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity.'" *St. Arnant,* 390 U.S. at 731. Actual malice is a *subjective* inquiry; it is not based on whether a "reasonably prudent" person would have conducted further investigation prior to publishing. *Harte-Hank Communications,* 491 U.S. at 688. Because Revell fails to offer *any* evidence concerning defendant's subjective state of mind, we have before us no "concrete evidence from which a reasonable juror could return a verdict in his favor." *See Liberty Lobby,* 477 U.S. at 256.

Further, we have no evidence that Hoffman purposefully avoided the truth. On the contrary, Hoffman did conduct an investigation prior to publishing, -- and we have no facts before us that might call into question the veracity of Hoffman's sources. *Cf. id.* at 691 (citing *St. Amant,* 390 U.S. at 732). In short, Revell has failed to point to any evidence, aside from his allegations of "inherent improbability," that would support a jury finding of actual malice. Requiring publishers to finance trials based on such nebulous allegations would severely burden First Amendment rights.

Under *Rosenblatt,* Revell is a public official. *See Rosenblatt,* 383 U.S. at 85. Accordingly, he may not recover damages for defamation under state tort law absent a showing of actual malice. *See New York Times,* 376 U.S. at 279-80. Revell has failed to offer any evidence that Hoffman published *Oklahoma City Bombing* with actual malice. Likewise, Revell has failed to show that ARM acted with actual malice. *See St. Amant,* 390 U.S. at 730 (actual malice must be proved separately as to each defendant). Accordingly, the district court properly granted the defendants' motion for summary judgment on Revell's defamation claim.

C. Civil Conspiracy

Revell's alleged as part of his complaint that ARM conspired with Hoffmann to commit defamation. Under Oklahoma law, "[t]here can be no civil conspiracy where the *act* complained of and the *means employed* are lawful." *Brock v. Thompson,* 948 P.2d 279, 294 (Okla. 1997.) "Constitutionally protected speech that renders a defamation claim nonactionable also serves to defeat a claim of conspiracy where the means allegedly employed to achieve that purpose are lawful." *Id, Accordingly,* because we affirm the district court's grant of summary judgment on Revell's defamation claim, Revell's civil

conspiracy claim similarly fails. Thus, the district court properly granted the defendants' motion for summary judgment on Revell's civil conspiracy claim.

III. Conclusion For the reasons set out above, we AFFIRM.

FOOTNOTES

*' The Honorable Ruggero J. AIdisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

1. Hoffman relied upon several sources, including' (1) a Public Broadcasting System-sponsored book and a 1995 documentary, both accusing Revell of efforts to obstruct justice in collaboration with former Marine Lt. Col. Oliver North; (2) an essay by Hart Lidov highly critical of Revell, posted on the website *Columbia Journalism Review, USA* (www.cjr,org); (3) an article by Gene Wheaton, formerly with the U.S. Army Criminal Investigation Command, published in 1996 by the Portland Free Press, in which Wheaton alleges that several security consultants, including Revell, approached him proposing to create a "Death Squad" -- a group to assassinate individuals identified as "terrorists" by the White House; and (4) statements of Paul Hudson, an attorney and the head of the Pan Am 103 survivor's group, concerning the alleged advance warning of the Pan Am 103 bombing and allegations that Revell pulled his son off of Pan Am 103.

Appendix 2

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

OLIVER "BUCK" REVELL,

Plaintiff- Appellant,

v. No. 01-6169

DAVID HOFFMAN; ALEXANDER MAGNUS; AMERICANS FOR RESPONSIBLE MEDIA, a foreign corporation,

Defendants - Appellees.

ORDER

Filed December 10, 2002

Before TACHA, Chief Judge, ALDISERT', and McWILLIAMS, Circuit Judges.

This matter is before the court on appellant's "Motion to Supplement Petition for Reheating and Rehearing En Banc." The motion is granted.

Entered for the Court

PATRICK FISHER, Clerk

by: Deputy Clerk

The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Appendix 3

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

OLIVER "BUCK" REVELL,

Plaintiff- Appellant,

v.

No. 01-6169

DAVID HOFFMAN; ALEXANDER MAGNUS; AMERICANS FOR RESPONSIBLE MEDIA, a foreign corporation,

Defendants - Appellees.

ORDER

Filed December 10, 2002

Before TACHA, Chief Judge, ALDISERT, and McWILLIAMS, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active

service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

PATRICK FISHER, Clerk of Court

by:

Deputy Clerk

The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.